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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

THE RODEO COWBOYS ASSOCIATION, INC., A Colorado Corporation, and GEORGE WILLIAMS,

Petitioner,

vs.

ROBERT WEGNER,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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THE RODEO COWBOYS ASSOCIATION, INC., a Colorado Corporation, and GEORGE WILLIAMS, Petitioner,

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BRIEF IN OPPOSITION
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ARGUMENT:

THE DECISIONS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO AND THE COURT OF APPEALS FOR THE TENTH CIRCUIT WERE TOTALLY IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

The petitioners in their "Argument for Allowance of the Writ" (p. 16, Petition) urge "that the Court of Appeals for the Tenth Circuit

has decided a case involving the most important of Federal constitutional questions, in a way totally at variance with the applicable decisions of this Court," thus grounding this Petition, on that portion of Rule 19, which states, "Where a Court of Appeals . . . has decided a Federal question in a way in conflict with applicable decisions of this Court."

The petitioners specifically urge that the trial court and the Court of Appeals failed to follow the guidelines and directives of this Court as set forth in New York Times Company v. Sullivan, 376 U.S. 254 (1964), and those cases following which set forth the requirement of proof that the libelous statement was made with actual malice, that is with knowledge that it was false or with reckless disregard of whether it was false or not.

At trial of this action in District Court for the District of Colorado, Judge Doyle instructed the jury with reference to malice as follows:

> "In a case like this, malice is an essential element. Make no mistake about it. And the plaintiff must prove and establish it. Because, as I say, the fact that the words are not malicious -- are not defamatory on their face. So then, what is malice? Malice imports an intent to injure. It means the doing of an act or intentionally or wilfully without cause or excuse and accompanied by ill will. Thus, the predominant issue is ill will rather than good faith efforts to advance one's own interest. And so, this is the aspect that you must be convinced on

in order to be convinced by a preponderance of the evidence that the plaintiff has proven his case and is entitled to recover. Namely, that there was a falsity about this; that it was defamatory in that it did injure him, his reputation; that it was accompanied by this element of malice which I have mentioned, that is, an express intent to injure; the doing of an act intentionally or wilfully, without cause or excuse, accompanied by ill will. It must have a predominant ill will aspect rather than a good faith effort to advance one's own interest. So, I say to you once again, this is the issue for you to determine: Were these words defamatory, considering all the evidence in the case; the words themselves with this background? Secondly, were these basically false? Thirdly, did there exist this essential element of malice?

"Now the defendant has alleged affirmatively that the words spoken were true. And, should you conclude this, really, that's the end of the case. Because, truth is an absolute defense in any kind of a defamation case. Indeed, the Constitution of Colorado which wholly applies in a case such as this recognizes the right of freedom of speech; freedom in which to write or publish whatever one will on any subject, the person being responsible for all abuse of that liberty. And, it further says that in all suits and prosecutions for libel the truth thereof may be given in evidence and the jury under the direction of the court shall determine the law and the fact.

"Now, the defendants deny, of course, all the allegations of the Complaint; that is, that the matter was defamatory; that it was malicious; that it was false. They also assert it was true. Moreover, they allege what is commonly called conditional or qualified privilege. It's a privilege which the law recognizes in many specific areas, but particularly, in a group or association, and it permits the publication -- permits a publisher who is advancing the group interest to utter defamation under certain circumstances.

"To the extent that in informing the members of the association, for example, he acts reasonably and for the purpose of serving the organization, the privilege applies. The privilege is lost, however, if he is guilty of malice; if he intentionally publishes something that is false, for example, or if he publishes it with a wilful and wanton disregard of its truth or falsity, or if it is published with a predominant purpose of injuring rather than advancing the group purpose, then the privilege is lost. And so, I recap the defenses; first, a denial of the allegations in the Complaint. Secondly, truth. Thirdly, this qualified privilege. These are the defenses that are asserted.

"Now, when the defendant alleges an affirmative defense such as truth, to a limited extent at least -- of course, the plaintiff has the burden of proving falsity. So really, truth is an issue throughout the trial. But, it's said that when it is asserted

and attempted to be proven by the defendant, he has the burden of proving it by a preponderance of the evidence. So, both sides have the burden of proof; one is falsity, and the other truth. As to qualified privilege, however, the burden is on the defendant first to establish that the occasion is a privileged one, and undoubtedly it is. Certainly it's an association, and it's entitled to publish information of interest to all of its members. And so really, the question with respect to this is whether the privilege has been abused. Has it been abused unreasonably? Has it been used as I say with a predominant purpose of injuring? Has there been actual malice? Or, can malice be implied from the fact, if it is a fact, that it was false? And, that the defendants knew it. You would have to find that. Or, that they published it without regard -- wantonly and wilfully without regard to its truth or falsity. I would say that finally the plaintiff has got the burden of proving that the defendant acted with malice in this respect. And, the defendant doesn't have to prove that it acted without malice. It merely has to establish it was a privileged occasion and must make a preliminary showing that it acted with good purpose in the interest of its group.

"And then I think that the final burden is on the plaintiff to prove the existence of malice either actual malice or malice that is inferred from the fact that there was over publication beyond the group -- malice

inferred from the fact that the falsity -- the knowingly falsity publication or wilful and wanton falsity; or, a motive, if that be a fact of injury, of ill will rather than advancing one's own interest." (A. 259-262)

Following the Court's charge to the jury, the following took place:

"Mr. Dwyer [attorney for petitioner]: Did I understand you to say when you were defining actual malice which is necessary in this case that it could be inferred from the falsity of the statement alone?

"The Court: If it was intentionally false or if it was given under wanton and wilful disregard for truth or falsity.

"Mr. Dwyer: That part I can understand, but I didn't know whether I heard you say you could infer malice from the mere fact it was a false statement.

"The Court: Oh, no.

"Mr. Dwyer: The only other objection I have is if the Court has determined that this is not libel per se, then the recovery should be limited to special damages. I make that objection.

"The Court: Okay.

"(Resumed to Open Court)

"The Court: One thing I wanted to clarify was that in connection with this conditional or qualified privilege, and I hate to burden you with this -- but I feel I must clarify it. In order to lose the privilege I said that there must be wilful falsity, and not mere falsity. In other words, inadvertent falsity, and not a falsity to members of the group advancing the interest of the group, would be within the privilege." (A. 265)

No other objections were made to the Court's charge by the petitioner.

In neither the petitioner's motion denominated, Alternative Motion for Judgment Notwithstanding the Verdict or New Trial (A. 182), nor in their briefs or arguments before the United States Court of Appeals for the Tenth Circuit did the petitioners ever question the propriety of the trial court's instructions to the jury. The respondent urges this Court that proper consideration was given to the applicable decisions of this Court and that the petitioner has made no complaint or objection to these instructions until the filing of his Petition for Certiorari. This Court has consistently held that petitioners could not thereby create grounds to Certiorari, see McCullough v. Kammer Corporation, 323 U.S. 327 (1945); Wisconsin v. Federal Power Commission, 373 U.S. 294 (1963); and Lopez v. United States, 373 U.S. 427 (1963).

The petitioners further assert that the respondents proved no damages in their case in trial court.

Bob Wegner, the plaintiff, stated that he was a rodeo cowboy [R. 20, A. 2]; that following his retirement from the Rodeo Cowboys Association, he took steps to form the American Cowboys Association [R. 48, A. 20], and that he incorporated the American Cowboys Association in the State of Washington [R. 48, 7-18, A. 20].

An examination of plaintiff's Exhibit 13 [R. 324, A. 229-33] shows that the purposes of the American Cowboys Association involved, among other things, the entering into of contracts with rodeo professionals willing to compete in rodeo competition [R. 324, A. 229].

Article 9 of those Articles of Incorporation [Exhibit 13, A. 231] shows Robert Wegner as one of those who will manage the affairs of the corporation.

Article 10 [A. 232] shows Robert Wegner as the chief stockholder of this corporation.

Plaintiff's Exhibits 11 and 12 [A. 224-28] and plaintiff's discussion of these, clearly shows Robert Wegner's involvement in the affairs of and promotion of the American Cowboys Association [R. 70-71, A. 36].

It was the plaintiff's theory throughout this case that the defendants wilfully and maliciously carried on a campaign of libel against him and his business, the American Cowboys Association. An examination of Exhibits 2, 3 and 10 shows substantial evidence to support this theory.

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The defendants' own witness, Gene Pruett, the Secretary-Treasurer of the Rodeo Cowboys Association, clearly indicated that the publications regarding Robert Wegner, set forth in plaintiff's Exhibits 2 and 3, would cause a loss of respect for Mr. Wegner [R. 243, A. 149].

The jury was properly instructed that in order to find substantial actual damages, they would have to determine that there was substantial injury to the plaintiff's reputation [S. 34, A. 262].

Before the jury was evidence that after Mr. Wegner resigned [Exhibit 1, R. 313, A. 197-98], the defendants suspended him [Exhibit 9, R. 320, A. 216-17]; that they published this suspension in Rodeo Sports News [Exhibit 2, R. 314, A. 198], commented on it in Exhibit 3 [R. 315, A. 204]; and it was stipulated by counsel that Mr. Wegner's name appeared on the suspended list in every issue of the Rodeo Sports News from the time of his suspension until the most recent issues published prior to trial [R. 155-156, A. 92].

Testimony established that this publication went to at least 20,000 readers twice a month [R. 236-237, A. 145].

Simple arithmetic computation shows that from the time of the first publication of this libel, February 1, 1967, until the time of trial, July 15, 1968, a period of at least eighteen months passed, during which time there were published 36 issues of the Rodeo Sports News. This libel was, therefore, reiterated 720,000 times, a

libel that the defendants' own Secretary-Treasurer, Mr. Pruett, construed as damaging to the plaintiff's reputation [R. 241-243, A. 149]. Further, as to the expectable result of this multitudinous and continued libel, the jury had before them in Exhibits 7 and 7A [R. 317-318, A. 213-15] the rules of the Rodeo Cowboys Association; printed copies of which were supplied to all members [R. 96, A. 54]. Rule 7 of these rules states as follows:

> "7. Any member will be fined, suspended or both from the Association for any of the following offenses:
>
> "a. Bad checks as specified.
>
> "b. Failure to pay hotel bills.
>
> "c. Non-payment of entrance fees.
>
> "d. Fighting in the arena.
>
> "e. Quarreling in the arena.
>
> "f. Attempting to fix, threaten, bribe, influence or harass the judges at any time between the opening and closing dates of a rodeo, in or out of the arena, or for talking with a judge or timer while an event is in progress. Violators of this rule shall be reported to the Association board by the judge or judges involved, or by the arena director or stock contractor of the rodeo where the violation occurred.
>
> "g. Attempting to fix, threaten, bribe, influence or harass a director, spokesman, or official of the Rodeo Cowboys Association at any time.
>
> "h. Any member sending in a fraudulent claim on the R.C.A. Group Insurance shall be fined and suspended by the Board. Claims are legitimate only if injury is

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incurred during the dates of the rodeo and inside the rodeo enclosure.

"i. Conduct or speech of any kind detrimental to the best interests of the Rodeo Cowboys Association or the sport of rodeo.

"j. Failure to abide by or disobedience of Articles, By-Laws, and Rules of this Association."

With this before them, the jury could have properly decided that the listing of Mr. Wegner on the defendants' suspended list in its publication, continuously over a period of eighteen months, could have created the inference in any one or all of the readers' minds that Mr. Wegner was suspended for violating any one or more of these above-quoted rules, thereby further damaging his reputation.

CONCLUSION:

The respondents at trial pleaded, proved, and there was an actual finding of actually existing malice or reckless disregard for the truth on the part of the petitioners and substantial evidence to support the jury's award of damages. For these reasons, it is urged that this Honorable Court refuse to take jurisdiction of the within matter.

Most respectfully submitted,

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